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Mohd Isa bin Abdul Samad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(SH)-28–02 OF 2021
VAZEER ALAM, AHMAD ZAIDI IBRAHIM, AND KOMATHY SUPPIAH JJCA
17 MARCH 2025

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Criminal Law — Corruption — Accepting gratification — Whether prosecution failed to prove charges under s 16(a)(A) Malaysian Anti-Corruption Commission Act 2009 that accused solicited for and received corruption monies — Whether trial court's failure to properly evaluate the evidence resulted in accused being wrongly found guilty as charged

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The appellant was at all material times the chairman of the Federal Land Development Authority ('FELDA') and a board member of FELDA's investment arm, FICSB. FELDA's board of directors, chaired by the appellant, had approved the setting up of FICSB but mandated that its board of directors should not undertake any investment project exceeding RM100m in value. Soon after FICSB's formation, a company ('GAPSB') that owned a hotel and suites ('MPHS') in Sarawak offered to sell MPHS to FICSB for RM200m but the offer was rejected. Subsequently, a director and shareholder of GAPSB ('Ikhwan') met with the appellant to seek his help to persuade FICSB's board to buy MPHS at a lower price of RM160m. FICSB agreed to the offer and the parties inked the deal. Sometime thereafter, the Malaysian Anti-Corruption Commission ('MACC'), acting on information received, commenced investigations into allegations that the appellant had abused his position as director of FICSB and had accepted bribes for himself in relation to the company's purchase of MPHS. The investigations led to the appellant being charged in the High Court for ten offences — one charge of committing criminal breach of trust ('CBT') under s 409 of the Penal Code ('the CBT charge') and nine charges under s 16(a)(A) of the MACC Act 2009 ('the MACCA charges') of corruptly accepting a total of RM3.09m from Ikhwan through the appellant's then special officer, SP 21, as payment for facilitating FICSB's purchase of MPHS. In essence, the CBT charge stated that the appellant, as FICSB's director, committed CBT when he approved the MPHS's purchase without getting the approval of FELDA's board of directors and had thereby breached FELDA's mandate that FICSB should not undertake any investment exceeding RM100m in value. At the end of the prosecution's case, the High Court found that no prima facie case on the CBT charge had been proven and acquitted and discharged the appellant of the same. The prosecution appealed against the decision but later withdrew the appeal. In

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respect of the MACCA charges, however, the court found that a prima facie case had been proven and invoked the statutory presumption against the appellant under s 50(1) of the MACCA and called for his defence. Finding that the defence did not raise any reasonable doubt on the prosecution's case, the trial court convicted and sentenced the appellant to six years' jail and a fine of RM15,450 in default two years' jail. The instant appeal was against the conviction and sentence.

Held, unanimously allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) When he dismissed the CBT charge, the trial judge found that there was no credible evidence to show that the appellant approved FICSB's purchase of MPHS (which approval was a collective decision of FICSB's board and not singularly that of the appellant's) nor that he had directed or influenced the FICSB board to approve the purchase. This finding would not only have rebutted the s 50(1) of the MACCA presumption but would also have demolished the prosecution's case altogether. As such, the trial judge's invocation of the s 50(1) presumption and his direction to the appellant to make his defence to the MACCA charges was misplaced as it went against the trial judge's findings in respect of the CBT charge (see paras 35–36).

(2) There was no credible evidence to show that the appellant had asked for payment of gratification directly from Ikhwan or Ibrahim Baki or that he had instructed SP21 to demand such payment from Ikhwan as reward for helping to obtain FICSB's approval for the purchase of MPHS (see paras 37–39 & 65).

(3) If Ikhwan had made payments to SP21 based on his apprehension that the appellant might use his influence to scuttle the transaction if gratification was not paid, then that was not what the MACCA charges stated. The charges stated that gratification was paid as reward for the appellant's help to approve the sale of MPHS to FICSB. The charges as framed clearly did not accord with the evidence that was adduced and with the changed narrative that the prosecution advanced midstream through the trial. This alone was sufficient to acquit and discharge the appellant at the close of the prosecution's case as no prima facie case as per the charges was established (see paras 40, 42–43 & 48).

(4) The trial judge misdirected himself when he ruled that a prima facie case was established based on Ikhwan's evidence that he gave the gratification because he feared the appellant might use his influence as FELDA chairman to scuttle the completion of the sale. There was absolutely no evidence that the appellant had said that he would scuttle the deal if payment was not made nor was there any basis to make such an inference (see paras 49 & 55).

(5) The trial judge wrongly found that the appellant had sought payment of gratification indirectly through SP21 by way of requesting SP21 to convey his 'salam' to Ikhwan from time to time and in his telling SP21 'kalau dia orang bagi apa-apa nanti, kau ambil lah' as an instruction or direction or sign or code to demand gratification monies from Ikhwan or Ibrahim Baki. The finding that there was demand for gratification made by the appellant through SP21 as conduit and that Ikhwan had made nine payments via SP21 to the appellant was not borne out by credible evidence. There was also no evidential basis for the trial judge to make an inference that the conveying of 'salam' to Ikhwan was a signal or trigger for SP21 to demand payment from Ikhwan (see paras 56–58 & 65–66).

(6) The trial judge's failure to undertake a wholesome and proper judicial appreciation of SP21's evidence in its entirety — especially given the many material contradictions in his testimony — was a serious non-direction amounting to a misdirection that warranted appellate intervention (see paras 61–63).

[Bahasa Malaysia summary

Pada setiap masa material, perayu merupakan pengerusi Lembaga Kemajuan Tanah Persekutuan ('FELDA') dan ahli lembaga syarikat pelaburan FELDA iaitu FICSB. Lembaga pengarah FELDA yang dipengerusikan oleh perayu telah meluluskan penubuhan FICSB tetapi memberi mandat bahawa lembaga pengarahnya tidak boleh menjalankan sebarang projek pelaburan melebihi nilai RM100 juta. Tidak lama selepas penubuhan FICSB, sebuah syarikat ('GAPSB') yang memiliki hotel dan suite ('MPHS') di Sarawak menawarkan untuk menjual MPHS kepada FICSB dengan harga RM200 juta tetapi tawaran itu ditolak. Selepas itu, seorang pengarah dan pemegang saham GAPSB ('Ikhwan') bertemu dengan perayu untuk mendapatkan bantuannya untuk memujuk lembaga pengarah FICSB membeli MPHS pada harga yang lebih rendah iaitu RM160 juta. FICSB bersetuju dengan tawaran itu dan pihak-pihak menandatangani perjanjian itu. Beberapa ketika selepas itu, Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'), bertindak atas maklumat yang diterima untuk memulakan siasatan terhadap dakwaan bahawa perayu telah menyalahgunakan kedudukannya sebagai pengarah FICSB dan telah menerima rasuah untuk dirinya sendiri berhubung pembelian MPHS oleh syarikat itu. Siasatan tersebut kemudiannya membawa kepada perayu dituduh di Mahkamah Tinggi atas sepuluh kesalahan — satu pertuduhan melakukan pecah amanah jenayah ('CBT') di bawah s 409 Kanun Keseksaan ('pertuduhan CBT') dan sembilan pertuduhan di bawah s 16(a)(A) Akta SPRM 2009 ('pertuduhan SPRM') kerana menerima sejumlah RM3.09 juta secara rasuah daripada Ikhwan melalui pegawai khas perayu ketika itu iaitu SP21 sebagai bayaran untuk memudahkan pembelian MPHS oleh FICSB. Pada asasnya, pertuduhan CBT menyatakan bahawa perayu selaku pengarah FICSB melakukan perbuatan CBT apabila meluluskan pembelian MPHS tanpa

mendapat kelulusan lembaga pengarah FELDA dan telah melanggar mandat FELDA bahawa FICSB tidak boleh melakukan sebarang pelaburan melebihi nilai RM100 juta. Pada akhir kes pendakwaan, Mahkamah Tinggi mendapati bahawa tiada kes prima facie mengenai pertuduhan CBT telah dibuktikan dan melepaskan dan membebaskan perayu daripada pertuduhan tersebut. Pihak pendakwaan merayu terhadap keputusan itu tetapi kemudian menarik balik rayuan itu. Walau bagaimanapun, berkenaan dengan pertuduhan SPRM, Mahkamah mendapati bahawa kes prima facie telah dibuktikan dan menggunakan anggapan statutori terhadap perayu di bawah s 50(1) SPRM dan memanggilnya untuk membela diri. Apabila mendapati bahawa pihak pembelaan tidak menimbulkan sebarang keraguan munasabah terhadap kes pendakwaan, mahkamah perbicaraan mensabitkan dan menjatuhkan hukuman penjara enam tahun dan denda RM15,450 jika gagal bayar hukuman penjara selama dua tahun. Rayuan ini adalah terhadap sabitan dan hukuman tersebut.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan sabitan dan hukuman dan melepaskan dan membebaskan perayu:

(1) Hakim perbicaraan mendapati bahawa tiada keterangan yang boleh dipercayai untuk menunjukkan bahawa perayu meluluskan pembelian MPHS oleh FICSB (yang kelulusannya adalah keputusan kolektif lembaga FICSB dan bukan perayu) atau bahawa dia telah mengarahkan atau mempengaruhi lembaga FICSB untuk meluluskan pembelian itu apabila menolak pertuduhan CBT tersebut. Penemuan ini bukan sahaja menyangkal anggapan s 50(1) Akta SPRM tetapi juga melemahkan kes pendakwaan. Oleh itu, penggunaan anggapan s 50(1) oleh hakim perbicaraan dan perintah supaya perayu membela diri terhadap pertuduhan SPRM adalah salah kerana ianya bertentangan dengan penemuan hakim perbicaraan berkenaan pertuduhan CBT (lihat perenggan 35–36).

(2) Tiada keterangan yang boleh dipercayai untuk menunjukkan bahawa perayu telah meminta pembayaran suapan daripada Ikhwan atau Ibrahim Baki secara terus atau dia telah mengarahkan SP21 untuk menuntut bayaran sedemikian daripada Ikhwan sebagai ganjaran kerana membantu mendapatkan kelulusan FICSB untuk pembelian MPHS (lihat perenggan 37–39 & 65).

(3) Sekiranya Ikhwan telah membuat bayaran kepada SP21 berdasarkan kebimbangannya bahawa perayu mungkin menggunakan pengaruhnya untuk membatalkan transaksi sekiranya suapan tidak dibayar, maka itu bukanlah seperti yang dinyatakan di dalam pertuduhan SPRM. Pertuduhan tersebut menyatakan bahawa suapan dibayar sebagai ganjaran atas bantuan perayu untuk meluluskan penjualan MPHS kepada FICSB. Pertuduhan yang dibuat sedemikian jelas tidak sesuai

dengan keterangan yang dikemukakan dan perubahan naratif yang dikemukakan oleh pendakwaan di pertengahan perbicaraan. Hal ini sahaja sudah cukup untuk melepaskan dan membebaskan perayu pada akhir kes pendakwaan kerana tiada kes prima facie menurut pertuduhan tersebut (lihat perenggan 40, 42–43 & 48).

(4) Hakim perbicaraan terkhilaf apabila memutuskan bahawa kes prima facie berjaya dibuktikan berdasarkan keterangan Ikhwan bahawa beliau memberikan suapan kerana bimbang perayu mungkin menggunakan pengaruhnya sebagai pengerusi FELDA untuk menggagalkan penyelesaian jualan. Tiada keterangan yang menunjukkan bahawa perayu mengatakan bahawa dia akan membatalkan perjanjian itu sekiranya pembayaran tidak dibuat dan tiada asas untuk membuat kesimpulan sedemikian (lihat perenggan 49 & 55).

(5) Hakim perbicaraan terkhilaf apabila mendapati bahawa perayu telah memohon pembayaran suapan secara tidak langsung melalui SP21 dengan cara meminta SP21 untuk menyampaikan 'salam' beliau kepada Ikhwan dari semasa ke semasa dan memberitahu SP21 'kalau dia orang bagi apa-apa nanti, kau ambil lah' sebagai arahan atau petunjuk atau cara untuk menuntut wang suapan daripada Ikhwan atau Ibrahim Baki. Penemuan bahawa terdapat permintaan untuk suapan yang dibuat oleh perayu melalui SP21 sebagai orang tengah dan bahawa Ikhwan telah membuat sembilan pembayaran melalui SP21 kepada perayu tidak disokong oleh keterangan yang boleh dipercayai. Juga tidak ada asas bagi hakim perbicaraan untuk membuat kesimpulan bahawa penyampaian 'salam' kepada Ikhwan adalah isyarat atau pencetus untuk SP21 menuntut bayaran daripada Ikhwan (lihat perenggan 56-58 & 65–66).

(6) Kegagalan hakim perbicaraan untuk melakukan penilaian kehakiman yang betul dan sewajarnya terhadap keterangan SP21 secara keseluruhan — terutamanya apabila terdapat banyak percanggahan material dalam keterangannya — adalah kekhilafan yang serius yang menjurus kepada salah arah yang memerlukan campur tangan rayuan ini (lihat perenggan 61–63).]

Cases referred to

Dato' Sri Mohd Najib Hj Abd Razak v PP [2021] MLJU 2485; [2022] 1 CLJ 491, CA (refd)

Koo Wing Cheung (L) & Anor v PP [2014] 1 MLJ 229; [2014] 1 CLJ 46, CA (refd)

Maharashtra State Board of S & HS Education v KS Gandhi [1991] 2 SCC 716, SC (refd)

Nasrul Annuar bin Abd Samad v PP [2005] 1 MLJ 619; [2005] 1 CLJ 193, HC (refd)

Noordin Sadakathullah & Ors v PP [2018] MLJU 1721; [2019] 1 CLJ 748, CA (refd)
Pendakwa Raya lwn Tan Sri Mohd Isa bin Abdul Samad [2022] 12 MLJ 747, HC (refd)
PP v Lee Pak [1937] 1 MLJ 265 (refd)
PP v Yap Kok Meng [1974] 1 MLJ 108b (refd)
Ravindran a/l Ramasamy v PP [2015] 6 MLJ 509, FC (refd)
Teng Kum Seng v PP [1960] 1 MLJ 225 (refd)

Legislation referred to

Criminal Procedure Code ss 153(1), 158, 182
Malaysian Anti-Corruption Commission Act 2009 ss 16, 16(a)(A), 50, 50(1), 62
Penal Code s 409

Appeal from: *Pendakwa Raya lwn Tan Sri Mohd Isa bin Abdul Samad* [2022] 12 MLJ 747 (High Court, Kuala Lumpur)

Setia Salehuddin Saidin (Siti Sarah bt Khalil, Abu Bakar bin Isa Ramat and Hafizuddin bin Salehuddin) (Salehuddin Saidin & Assoc) (Hafarizam Wan & Aisha Mubarak) for the appellant.
Afzainizam bin Abdul Aziz (with Natasha Chin Le Jy and Muhammad Asraf bin Mohamed Tahir) (Attorney General's Chambers, Putrajaya) for the respondent.

Vazeer Alam JCA:

INTRODUCTION

[1] The appellant, who previously served as Menteri Besar of Negeri Sembilan, at the material time of the charges held the position of Chairman of the Federal Land Development Authority ('FELDA'), a statutory body. He was also a member of the FELDA Board of Directors ('FELDA Board') between October 2012 and January 2017.

[2] The appellant was charged at the High Court with one count of criminal breach of trust ('CBT') under s 409 of the Penal Code ('the PC') and nine counts of corruptly accepting bribes under s 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACCA').

[3] The appellant pleaded not guilty and claimed trial to all ten charges.

A BACKGROUND FACTS

[4] The appellant as FELDA Chairman, was among others, responsible for chairing FELDA Board meetings, which were attended by:

B (a) the FELDA Board members;

(b) the Director General of FELDA and Deputy Director Generals of FELDA, who attended on behalf of the management; and

(c) the company secretary.

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[5] In the FELDA Board meeting held on 25 June 2013 ('meeting No 303'), the FELDA Board approved the establishment of Felda Investment Corp Sdn Bhd ('FICSB'), a wholly owned subsidiary of FELDA, as a special purpose vehicle ('SPV') to carry out FELDA's strategic investment activities. FICSB's D initial investment business plan covered four main areas namely fund management, private financing initiatives, recession-proof investment and internal resource management. FICSB was funded with an initial paid-up capital of RM500m, which was injected by FELDA in stages. In the said E meeting No 303, the FELDA Board had agreed that the first three members of the FICSB Board of Directors shall be the: (a) appellant; (b) Datuk Faizoull bin Ahmad (FELDA Director General at the time); and (c) Muhammad Sufi bin Mahbub (FELDA Deputy Director General). The FELDA Board also mandated the FICSB Board of Directors to make investment decisions F involving projects worth no more than RM100m.

[6] Gegasan Abadi Properties Sdn Bhd ('GAPSB') as the owner of Merdeka Palace Hotel & Suites ('MPHS') situated in Kuching, Sarawak, offered to sell MPHS to FELDA at a price of RM200m. However, the Board of Directors of G FICSB rejected the said offer because the investment was considered not profitable nor viable for FICSB.

[7] Subsequently, through a letter of offer dated 28 March 2014 ('P249') addressed to the Chairman of FELDA, GAPSB made a fresh offer to FICSB to H sell MPHS at a price of RM165m. As a follow up to the letter dated 28 March 2014, Ikhwan bin Zaidel ('SP16'), who is a director and shareholder of GAPSB, and one Ibrahim bin Baki from GAPSB met the appellant in his office and asked the appellant to reconsider the decision of FICSB based on the new offer. The appellant gave a positive response but did not promise anything I because the final decision was with the FICSB Board of Directors.

[8] Before the new offer at the price of RM165m could be presented at the FICSB Board meeting, SP16 sent a facsimile letter to FICSB containing a further revised offer by GAPSB to sell MPHS at a price of RM160m after an

additional discount of RM5m. The Chief Executive Officer ('CEO') of FICSB (SP15) informed the appellant of this latest offer received from GAPSB. The appellant, nevertheless, instructed SP15 to proceed with the presentation of the proposal paper to the upcoming FICSB Board of Directors meeting which was the tenth FICSB Board of Directors Meeting.

[9] According to SP15, before he presented the papers on the offer by GAPSB, the appellant informed the FICSB Board of Directors that the Prime Minister had asked FICSB to review the decision of the FICSB Board of Directors that had rejected the proposed takeover of MPHS. The appellant also suggested that the Board of Directors of FICSB consider the purchase of MPHS based on GAPSB's latest offer price of RM160m.

[10] FICSB Board of Directors unanimously agreed, without any query, to the proposed acquisition of MPHS, subject to the final price not exceeding RM160m. Authority was given to the CEO to execute all documents relevant to the proposed acquisition of MPHS.

[11] However, the acquisition of MPHS needed FELDA Board approval since the investment value of MPHS exceeded RM100m, which was the maximum investment mandate of the FICSB Board. The appellant, however instructed that the matter need not be presented at the FELDA Board because some of the FELDA Board Members who had approved the proposed acquisition of the MPHS were also FICSB Board Members.

[12] On 27 June 2014, FICSB and GAPSB signed a sale and purchase agreement ('SPA') for the acquisition MPHS by FICSB (P258) at a price of RM160m. The SPA stated that the purchase consideration was comprised of: (a) RM153m (hotel land and building); (b) RM6m (contract and goodwill); and (c) RM1m (fixed assets).

[13] On 26 July 2017, the MACC received information related to the appellant, who was said to have abused his position as Chairman of FICSB between 2013 and 2016 and allegedly received bribes for himself in relation to the acquisition of MPHS. MACC proceeded to investigate the complaint.

[14] The appellant was later charged with one count of criminal breach of trust under s 409 of the PC and nine counts of accepting bribes under s 16(a)(A) of the MACCA amounting to RM3.09m from Ikhwan bin Zaidel ('SP16') through Muhammad Zahid bin Md Arip ('SP21'), the appellant's then special officer, as payment to the appellant for allegedly helping to approve the purchase of MPHS by FICSB at a price of RM160m.

A THE CHARGES

[15] As stated earlier, the appellant was initially charged with a total of ten charges, and the charges read as follows:

B (a) the CBT charge under s 409 of the PC.
The first charge:

> Bahawa kamu pada 29 April 2014 di Tingkat 50, Menara Felda, Platinum Park, surat tawaran 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen iaitu Pengarah Syarikat Felda Investment Corporation Sdn Bhd (surat tawaran Syarikat 1052445-A) dan di dalam kapasiti tersebut diamanahkan dengan harta tertentu iaitu dana syarikat Felda Investment Corporation Sdn Bhd telah melakukan pecah amanah jenayah ke atas dana tersebut, di mana kamu telah dengan curangnya melepaskan harta tersebut dengan meluluskan cadangan pembelian Merdeka Palace Hotel & Suites Kuching, Sarawak dengan harga RM160 juta tanpa kelulusan Ahli Lembaga Pengarah Lembaga Kemajuan Tanah Persekutuan (FELDA) bertentangan dengan keputusan Mesyuarat Ahli Lembaga Pengarah FELDA Bilangan 303 bertarikh 25 Jun 2013 yang dibuat berkenaan pelaksanaan amanah tersebut di mana Ahli Lembaga Pengarah Felda memberi mandat kepada Ahli Lembaga Pengarah Syarikat Felda Investment Corporation Sdn Bhd dalam membuat keputusan pelaburan yang melibatkan projek yang bernilai RM100 juta ke bawah dan oleh yang demikian kamu telah melakukan suatu kesalahan pecah amanah jenayah iaitu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan.

F (b) the s 16(a)(A) of the MACCA bribery charges.
The second charge:

> Bahawa kamu di antara 21 Julai 2014 hingga 28 Julai 2014, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM100,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The third charge:

> Bahawa kamu di antara 21 Julai 2014 hingga 28 Julai 2014, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM140,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di

Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The fourth charge:

Bahawa kamu di antara 17 Oktober 2014 hingga 24 Oktober 2014, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM300,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The fifth charge:

Bahawa kamu di antara 15 November 2014 hingga 22 November 2014, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM250,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The sixth charge:

Bahawa kamu di antara 25 Jun 2015 hingga 27 Jun 2015, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The seventh charge:

Bahawa kamu di antara 9 Julai 2015 hingga 11 Julai 2015, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00

daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The eight charge:

Bahawa kamu di antara 20 Ogos 2015 hingga 27 Ogos 2015, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM300,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The ninth charge:

Bahawa kamu di antara 12 September 2015 hingga 14 September 2015, di Tingkat 49, Menara Felda, Platinum Park, No. 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

The tenth charge:

Bahawa kamu di antara 4 Disember 2015 hingga 11 Disember 2015, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM500,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

THE AMENDED CHARGES

[16] Following the end of cross examination of the prosecution's main witness Muhammad Zahid bin Md Arip ('SP21'), the prosecution applied to amend all nine charges under s 16(a)(A) of the MACCA in respect of the time frame of the dates the bribes were allegedly given by Muhammad Zahid bin Md Arip (SP21) to the appellant, after SP21 had periodically received them from Ikhwan bin Zaidel (SP16). This application was objected to by the defence. However, the High Court allowed the amendments to be made based on the provision of s 158 of the Criminal Procedure Code ('the CPC') which empowers the court to amend the charges at any time before the judgment is delivered. The court took into account that the amendments only involved the dates and did not touch anything else. The essence of the nine charges under s 16(a)(A) of the MACCA remained unchanged. The defence was nevertheless given the opportunity to conduct additional cross-examination of SP21 after the amendments were allowed by the court.

[17] The trial court also allowed the defence to recall any prosecution witnesses who had hitherto testified to be examined further in respect of the amended dates specified in the nine amended charges. In the circumstance, the learned trial judge was of the view that the amendments did not cause any prejudice or injustice to the appellant. However, the defence chose not to recall any of the prosecution witnesses.

[18] The amended second to tenth charges are found in para 19 of the learned trial judge's grounds of judgment. As noted earlier, apart from the dates, the substance of the charges remained the same.

THE PROSECUTION'S CASE

[19] The learned trial judge had in paras 20–137 of his grounds of judgment (*Pendakwa Raya lwn Tan Sri Mohd Isa bin Abdul Samad* [2022] 12 MLJ 747) dealt with the prosecution's case in some detail and we do not wish to restate the same. Suffice to say that reference may be had to the reported judgment of the High Court as cited above.

CLOSE OF PROSECUTION'S CASE — HIGH COURT'S DECISION

[20] At the end of the prosecution's case, the High Court held that the prosecution had failed to establish a prima facie case on the CBT charge under s 409 of the PC (first charge) and accordingly acquitted and discharged the appellant on that charge. The public prosecutor appealed that decision, but later withdrew the appeal.

[21] However, in respect of the nine charges under s 16(a)(A) of the MACCA, the High Court held that prima facie case had been established for all nine charges and in this regard the learned trial judge had invoked the presumption in s 50(1) of the MACCA which reads:

> 50 Presumption in certain offences
>
> (1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

This can be clearly seen in the ex tempore ruling of the learned trial judge in calling for the appellant to enter defence which is found in the record of proceedings:

> ... In view of the evidence of the receipt of the cash by the accused I therefore invoked the statutory presumption under s 50 of the MACC for the defence to rebut and show that the gratification in the form of cash was not received corruptly and that it was not obtained as a reward for the accused's involvement in the approval by the board of FIC of the purchase of the Merdeka Palace Hotel.

Accordingly the appellant was called to enter his defence.

THE DEFENCE CASE

[22] The appellant testified under oath and called a further five witnesses, as part of his defence. The essence of the appellant's defence to the nine charges of bribery under s 16(a)(A) of the MACCA is that he never asked for, nor received, any bribes from SP16 through SP21. The appellant vehemently denied the charges, and stated that he had no knowledge of the matters alleged in the nine charges. According to the appellant, this stance was made known in the course of defence's cross-examination of the prosecution witnesses, especially SP21.

[23] In fact, the defence had in accordance with s 62 of the MACCA submitted a statement of defence before the trial commenced. The statement contained the appellant's main defence to the charges, in that the appellant stated that:

(a) he had no knowledge of the bribes allegedly given by SP16; and

(b) denied having received any money in the form of bribes from SP21.

Reference can be made to the defence statement, for example in paras 9 and 10

that reads as follows:

> 9. Bagi tuduhan menerima suapan, pihak Pembelaan menafikan penglibatan OKT dan beliau juga tidak pernah menerima ataupun memperolehi rasuah serta tidak mempunyai apa-apa pengetahuan berkenaan dengan penerimaan rasuah tersebut. OKT juga tidak pernah menerima apa-apa wang rasuah daripada Ikhwan bin Zaidel melalui Zahid Md Arip sepertimana yang telah dipertuduhkan.
>
> 10. Malah, jika dilihat kepada tuduhan yang dikemukakan, hanya menunjukkan penglibatan Zahid Md Arip sahaja. Bahkan semua pembayaran wang telah dibuat kepada Zahid Md Arip sepertimana yang disebutkan di dalam pertuduhan terhadap OKT. Tiada sebarang keterangan yang menunjukkan pembayaran wang rasuah telah dibuat kepada OKT oleh Zahid Md Arip.

[24] After the defence case, the High Court found that the appellant had failed to raise any reasonable doubt on all the nine charges under s 16(a)(A) of the MACCA.

[25] The appellant was found guilty and sentenced to six years imprisonment for each conviction, where the sentences of imprisonment were to run concurrently. The appellant was also ordered to pay a fine of RM15.45m and in default of payment a two-year imprisonment sentence was imposed. This default term of imprisonment was to run consecutive to the six years imprisonment for each of the nine convictions.

[26] Being dissatisfied with the judgment of the High Court, the appellant appealed to this court against both conviction and sentence in respect of all the nine charges under s 16(a)(A) of the MACCA.

ISSUES RAISED IN THIS APPEAL

[27] Learned counsel for the appellant raised several issues in this appeal and they may be stated as follows:

(a) the learned trial judge erred when he decided that the prosecution had successfully proved a prima facie case at the end of the prosecution case for charges under s 16(a)(A) of the MACCA, when he had made a finding that there was no dishonest intention by the appellant in the charge of breach of trust under s 409 of the PC;

(b) the learned trial judge erred when making three different and inconsistent findings as to the purpose of gratification;

(c) the learned trial judge erred in failing to appreciate that SP21 was an interested witness;

(d) the learned trial judge erred in giving insufficient judicial appreciation to the defence raised by the appellant during the prosecution's case;

(e) the learned trial judge misdirected himself when he failed to sufficiently evaluate the credibility of SP21;

(f) the learned trial judge erred when making his findings in relation to one of the elements of the charge, namely, 'upah membantu kelulusan pembelian hotel MPHS oleh FICSB'; and

(g) the learned trial judge erred in failing to give adequate consideration and judicial appreciation to the appellant's defence when compared to the evaluation of the evidence given by the prosecution witnesses.

However, in these seven grounds can be taken under two main issues, as will be discussed below.

THE DUTY AND FUNCTION OF THE APPELLATE COURT

[28] In considering the arguments advanced by the appellant in respect of the several issues raised in this appeal, we have reminded ourselves of our appellate role. This court has in *Dato' Sri Mohd Najib Hj Abd Razak v Public Prosecutor* [2021] MLJU 2485; [2022] 1 CLJ 491 restated the duty and function of the appellate court as follows.

> [63] The duty and function of an appellate court when hearing and determining a criminal appeal is well laid down by high authority. In *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 3 CLJ 187; [1996] 2 MLJ 557, Gopal Sri Ram JCA (later FCJ) explained the principle in the following terms:
>
> > In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
> >
> > In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):
> >
> > > ... we gave leave because firstly we felt that there was no proper appraisal of *Shea Swarup v King-Emperor AIR* [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
> >
> > With respect, what Lord Russell of Killowen said in *Shea Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:
> >
> > > (1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused'. Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so.

In *Wilayat Khan v State of Uttar Pradesh* AIR [1953] SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

This principle was reiterated by Haidar Mohd Noor FCJ (later CJM) in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, where the Federal Court noted:

> It is an established principle that an appellate court should be slow to disturb the finding of facts of the lower court especially here where there are concurrent findings of facts by two courts namely the High Court and the Court of Appeal. Unless it can be shown that the finding of facts are not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree.

A

> Though there are no concurrent findings, and the findings on appeal are only that of the High Court, nevertheless, the principle is that when it comes to findings of facts by the trial judge, the appellate court would be slow to disturb those findings, unless the findings are perverse, unsupported by evidence, or go against the weight and grain of evidence.

B

In *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal summarised the principle and said that it is not the place of the appellate court to make its own findings of fact:

C

> Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lack the audio-visual advantage enjoyed by the trial court.

D

Then in *Mohd Yusri Mangsor & Anor v Public Prosecutor* [2014] 4 MLJ 875; [2014] 7 CLJ 897 the Court of Appeal speaking through Mohd Zawawi Salleh JCA (now FCJ) held:

> [4] We have heard learned counsel for the appellants and learned deputy public prosecutor ('DPP') at some length. We have also scrutinised the
E records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions.

F

> Where:
>
> (a) the judgment is based upon a wrong premise of fact or of law;
>
> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

G

> (c) the trial judge has completely overlooked the inherent probabilities of the case;
>
> (d) that the course of events affirmed by the trial judge could not have occurred;

H

> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
>
> (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same
I conclusion,
>
> then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

These pronouncements of the law are binding precedents for this court to follow. Though the principle is that the appellate court should be slow to disturb or interfere with the factual findings of the trial court, that does not, however, fetter the appellate court from scrutinising the findings and the circumstances leading to the findings of fact to ascertain if there are any compelling reasons for disagreeing with those findings. This rider to the general principle was reaffirmed by the Federal Court in *Dato' Seri Anwar Ibrahim v Public Prosecutor & another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737 in the following words:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh's* case 'there are substantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

And in the final analysis, the duty of the appellate court hearing a criminal appeal is to ascertain if the conviction is right and that it is safe for the conviction to stand. This was reaffirmed by the Court of Appeal in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, where the court held that in a criminal appeal:

> Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See *Mohammad Hussain v Emperor* AIR [1945] Nag 441; *Zahari bin Yeop Baai v Public Prosecutor* [1980] 1 MLJ 160; [1977] 1 LNS 162.

Based on the principles stated in the cases mentioned above, it can be concluded that the court hearing the appeal is ordinarily not to disturb findings of fact, however it is obliged to interfere with a trial court's factual findings if it is found that the trial court had misdirected itself in some way, or if there are substantial and compelling reasons for disagreeing with the findings, or if the finding of fact is plainly wrong. It is also a well-established principle that in exercising its appellate jurisdiction, this court is not constrained from re-evaluating the whole of the evidence that has been presented at the prosecution and defence stages. In re-evaluating the whole of the evidence, the court has to evaluate the defence presented by the appellant in totality with the evidence adduced through the prosecution witnesses.

[29] In deciding this appeal, we have taken heed of these well-established principles of appellate intervention in considering the issues raised by the appellant's learned counsel and the submissions of the learned deputy; and were guided by the principle that in a criminal appeal, the duty of the appellate court is to consider whether the conviction is right and safe.

A ANALYSIS OF THE ISSUES

The first issue — Whether the learned trial judge erred when he decided that the prosecution had successfully proved a prima facie case at the end of the prosecution case for the charges under s 16(a)(A) of the MACCA?

B

[30] For the nine s 16(a)(A) of the MACCA charges, the prosecution needs to prove the three main elements of the charges. They are:

(a) first, that the accused had personally or through others (such as SP21) received gratification from SP16 as alleged in each and every charge;

C

(b) second, the acceptance by the appellant of the said gratification was a quid pro quo for his assistance as board member of FICSB to approve the purchase of MPHS; and

D

(c) third, the acceptance of the bribes by the accused were done corruptly.

According to learned counsel for the appellant, the learned trial judge erred when he found that the prosecution had succeeded in proving a prima facie case at the end of the prosecution case for the charges of accepting bribes under s 16(a)(A) of the MACCA as the elements of the charges had not been proven.

E

[31] The nine charges under s 16(a)(A) of the MACCA are similar except for the date of the offence and the amount of gratification, and if we were to look at the second charge, ie the first of the s 16(a)(A) of the MACCA charges, it reads:

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> Second charge:
>
> Bahawa kamu di antara 21 Julai 2014 hingga 28 Julai 2014, di Tingkat 49, Menara Felda, Platinum Park, No 11, Persiaran KLCC, 50088, dalam Wilayah Persekutuan Kuala Lumpur, telah secara rasuah menerima suatu suapan untuk diri kamu iaitu wang tunai berjumlah RM100,000.00 daripada Ikhwan bin Zaidel iaitu Ahli Lembaga Pengarah Syarikat Gegasan Abadi Properties Sdn Bhd melalui Muhammad Zahid bin Md Arip *sebagai upah bagi membantu meluluskan pembelian* Merdeka Palace Hotel & Suites di Kuching, Sarawak oleh pihak Syarikat Felda Investment Corporation Sdn Bhd yang bernilai RM160 juta, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 16(a)(A) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.

G

H

[32] The charges state that the bribe was received as reward for the appellant's assistance in obtaining FICSB's approval for the sale. This is similar to the prosecution's opening statement, where at para 18 it is stated as follows:

I

> [18] Bagi sembilan (9) pertuduhan di bawah Seksyen 16(a)(A) ASPRM 2009, pihak Pendakwaan akan *mengemukakan keterangan* yang *menunjukkan Tertuduh telah mengarahkan Muhammad Zahid Md Arip*, Pegawai Khas Tertuduh untuk

mendapatkan suapan daripada Ikhwan bin Zaidel, Pengarah Syarikat Gagasan Abadi Properties Sdn Bhd *sebagai upah kepada Tertuduh kerana telah membantu meluluskan pembelian MPHS* oleh pihak FICSB bernilai RM160 juta.

[33] Hence, in order to establish a prima facie case for each of these nine charges, it was incumbent upon the prosecution to establish the fact that:

(a) the appellant had directed SP21 to obtain the sum of money as stated in the charges from SP16;

(b) that SP21 did receive the said sums of money from time to time from SP16 for an on behalf for the appellant;

(c) that these sums of money were received as gratification for the appellant assisting in obtaining the approval by FICSB to purchase MPHS from Sykt Gagasan Abadi Properties Sdn Bhd; and

(d) that the appellant did receive the gratification as stated in the charges from SP16 through SP21.

[34] Now, let me start with the prosecution's allegation that the appellant received gratification from SP16 as reward for his assistance in the approval of the purchase of MPHS by FICSB from Sykt Gagasan Abadi Properties Sdn Bhd, that is 'sebagai upah bagi membantu meluluskan pembelian Merdeka Palace Hotel & Suites di Kuching' as stated in all the nine charges. It is worth noting that in finding that the prosecution had established a prima facie case and in invoking the presumption in s 50(1) of the MACCA, the learned trial judge had stated:

... In view of the evidence of the receipt of the cash by the accused I therefore invoked the statutory presumption under s 50 of the MACC for *the defence to rebut and show that the gratification in the form of cash was not received corruptly and that it was not obtained as a reward for the accused's involvement in the approval by the board of FIC of the purchase of the Merdeka Palace Hotel*. (Emphasis added.)

[35] In our opinion, the invoking of s 50(1) of the MACCA, and the learned judge's direction to the appellant 'to rebut and show that the gratification in the form of cash was not received corruptly and that it was not obtained as a reward for the accused's involvement in the approval by the board of FIC of the purchase of the Merdeka Palace Hotel' is misplaced as it goes against the learned judge's findings in respect of the CBT charge. The learned trial judge had in dismissing the CBT charge found that though the appellant was a board member of FICSB, the decision to purchase MPHS was a collective decision of the board of FICSB. The following findings by the learned trial judge in his grounds of judgment are instructive:

[228] *Tidak boleh dinafikan bahawa pembelian MPHS yang memerlukan bayaran RM160 juta oleh FICSB diluluskan oleh Lembaga Pengarah FICSB*. lanya bukan

diluluskan oleh tertuduh. Ianya juga tidak boleh diluluskan oleh tertuduh bersendirian kerana undang-undang syarikat dan peraturan tata-urus FICSB meletakkan kuasa melulus pembelian atau pelaburan tersebut bukan di atas tertuduh atau mana-mana pengarah secara individu, tetapi ke atas Lembaga Pengarah FICSB secara kolektif.

[229] Ini tidaklah memeranjatkan kerana tata urus kelola syarikat yang baik tidaklah patut dijalankan sebegitu, lebih-lebih lagi dalam kes ini di mana amat jelas kehendak FELDA sebagai pemegang saham tunggal FICSB adalah supaya kelulusan melebihi RM100 juta diangkat ke Lembaga FELDA dan bagi yang bernilai RM100 juta dan ke bawah pula, di bawah autoriti Lembaga Pengarah FICSB (bukan mana-mana pengarah individu). *Mahkamah sekali lagi menekankan bahawa minit mesyuarat ke-10 Lembaga Pengarah FICSB pada 29 April 2014 (P41) secara terangnya merekodkan pembelian MPHS pada harga RM160 juta secara fakta dan undang-undangnya telah diluluskan oleh Lembaga Pengarah FICSB.*

[230] Oleh yang demikian walaupun sebagai seorang pengarah, waima juga sebagai pengerusi, beliau telah diamanahkan harta syarikat, tertuduh tidak boleh di bawah undang-undang dianggap telah melakukan pecah amanah jenayah dengan melupuskan harta wang FICSB bagi tujuan pembayaran pembelian MPHS kerana bukan sahaja beliau *secara individu sebagai pengarah dan pengerusi tiada kuasa untuk meluluskan pembelian tersebut, tetapi yang lebih penting lagi, pembelian tersebut telah diluluskan oleh Lembaga Pengarah FICSB yang dianggotai tujuh pengarah syarikat, lima daripadanya hadir di mesyuarat yang meluluskan pembelian MPHS tersebut, termasuk tertuduh dan SP15 yang juga CEO syarikat.*

[231] Minit Mesyuarat ke-10 Lembaga Pengarah FICSB (P41) juga dengan jelasnya merekodkan bahawa:

> The board was agreeable with the Management's opinion and noted there is a potential for investment in MPHS as the overall tourism market study shows a very positive outlook and therefore requested for Management to negotiate further on the offer price. (Penekanan ditambah.)

[232] *Tambahan pula, malah Mohamad Safari bin Abdullah (SP22) yang merupakan pegawai penyiasat kes ini sendiri semasa pemeriksaan balas turut mengesahkan bahawa keputusan pembelian MPHS ini dibuat oleh Lembaga Pengarah secara kolektif dan bukan keputusan seorang Ahli Lembaga Pengarah sahaja.* SP22 juga sebenarnya berkata tiada kesalahan dilakukan.

S: Soalan saya, apabila kita ada Felda Induk dan juga anak syarikat dia, FIC, keputusan yang dibuat oleh FIC saya khususkan kepada FIC apabila melibatkan pelaburan, apabila melibatkan pembelian dan penjualan dan sebagainya, mestilah ianya merupakan satu keputusan board, setuju?

J: Setuju.

S: Maknanya board itu Ahli Lembaga Pengarah?

J: Setuju.

S: Dan saya percaya kamu juga telah membuat penyiasatan tentang hal ini dan telah merampas, mengambil semua dokumen-dokumen iaitu minit-minit mesyuarat, resolusi syarikat dan sebagainya, betul?

J: Setuju.

S: Dan dalam penyiasatan kamu, pastinya kamu telah membuat satu analisa dan membuat keputusan bahawa di dalam kes ini bagi melibatkan pembelian Hotel Merdeka oleh FIC ianya dibuat melalui board, setuju? Ahli Lembaga Felda, sorry, Ahli Lembaga FIC?

J: FIC, ya, board FIC, yes.

S: Betul?

J: Betul.

S: Maknanya tiada langsung keterangan yang menunjukkan bahawa keputusan dibuat oleh salah seorang daripada Ahli Lembaga Pengarah, betul?

J: Betul.

[237] Mahkamah patut merujuk kepada keterangan *SP16 yakni pengarah syarikat Gagasan Abadi Properties Sdn Bhd (GAPSB), pemilik asal dan penjual MPHS, yang mengatakan di perjumpaan beliau dengan tertuduh kali pertama, tertuduh memberitahu SP16 bahawa sebarang kelulusan mengenai pembelian MPHS adalah bergantung kepada keputusan Lembaga Pengarah FICSB.*

S: Kamu jumpa dengan dia Tan Sri Isa jawab begini, apa Tan Sri Isa kata kamu jawab Isa beri respond yang positif dan *akan cuba membantu* kami namun *keputusan bergantung kepada mesyuarat Ahli Lembaga Pengarah* FICSB *tetapi dia tidak menjanjikan apa-apa kepada saya* dan Ibrahim Baki, betul?

J: Betul.

S: *So, even Isa cannot help you. He can only assist you but there is no guarantee because everything up to the Lembaga Pengarah to decide, am I right, he said that very clearly to you and Ibrahim Baki, setuju?*

J: *Ya.*

S: Even the pertemuan itu setengah jam. Zahid Md Arip tiada di situ. Setuju dengan saya bahawa Zahid Md Arip tiada, bukan? Zahid Md Arip sudah atur segalanya dia serahkan kamu kepada Tan Sri Isa, betul?

J: Ya, betul.

S: *Semasa kamu jumpa Tan Sri Isa, this was the only thing yang keluar daripada mulut dia. Saya boleh tolong bantu tetapi saya tidak janji. Pulang kepada Ahli Lembaga Pengarah dan saya juga tidak menjanjikan apa-apa. Itu sahaja yang dia cakap berkenaan pembelian Hotel Merdeka, bukan?*

J: *Ya.*

S: Very nice of him. Panggil ajak makan tengah hari lagi semasa itu, betul?

J: Betul.

S: Semasa makan tengah hari pun tidak cakap mengenai Hotel Merdeka tentang apa-apa hal. Dia hanya stick to what he had said earlier, am I right?

J: Right.

[238] Pihak pendakwaan sendiri dalam hujahan bertulis mereka juga mengatakan keputusan Ahli Lembaga Pengarah FICSB mengenai cadangan pengambilalihan

MPHS pada harga RM160 juta adalah sebulat suara dan direkodkan di bawah 'Perkara 5. PROPOSED ACQUISITION OF MERDEKA PALACE HOTEL & SUITES, KUCHING, SARAWAK' dalam Minit Mesyuarat Lembaga Pengarah FICSB Kali Ke-10 bertarikh 29 April 2014 (P41) yang dipetik seperti berikut:

> With no further questions arising, it was RESOLVED:
>
> THAT the Company be and is hereby authorised to proceed with the proposed acquisition of Merdeka Palace Hotel & Suite, Kuching, Sarawak, subject to the final negotiation on the price not exceeding RM160,000,000.
>
> THAT authority be and is hereby given to the Chief Executive Officer to execute all relevant documents in in respect of the proposed acquisition thereof.

[239] Oleh yang demikian, daripada keputusan tersebut, Lembaga Pengarah FICSB memutuskan sebulat suara tanpa sebarang soalan, bersetuju dengan cadangan pengambilalihan MPHS, tertakluk kepada perundingan akhir harga tidak melebihi RM160 juta dan kuasa diberikan kepada CEO untuk melaksanakan dokumen yang relevan dengan cadangan pengambilalihan MPHS tersebut.

[240] Menurut SP15, berdasarkan keputusan yang dibuat oleh Lembaga Pengarah FICSB beliau telah mencatatkan harga RM160 juta pada ruangan 'Approval Sought' pada Kertas Lembaga bertajuk 'FIC Board Paper Meeting Paper surat tawaran 4/4/2014 Proposed Acquisition of Merdeka Palace Hotel & Suites Kuching, Sarawak' (P69) tersebut. *Ini menjelaskan lagi tanpa sebarang keraguan bahawa kelulusan dibuat Lembaga Pengarah FICSB.*

[36] The learned trial judge also rejected the prosecution's assertion that the appellant influenced or forced the board members of FICSB to approve the purchase of MPHS. The following excerpts from the grounds of judgment as regards that are very telling:

[254] *Apakah keterangan yang menunjukkan pengarah lain diarah atau dipaksa untuk meluluskan cadangan yang dikatakan dipengaruhi oleh tertuduh? Mahkamah dapati ini tidak dibuktikan oleh pihak pendakwaan. Dapatan mahkamah adalah sebaliknya*. Atas beberapa sebab.

[255] Pertama, walaupun tertuduh Pengerusi FELDA dan FICSB, lantikan Ahli Lembaga Pengarah FICSB (yang mana semuanya kecuali SP15 adalah juga dalam Lembaga FELDA) ke Lembaga FELDA adalah dibuat oleh Menteri yang bertanggungjawab di bawah s 15(2) Akta Kemajuan Tanah 1956, seperti yang dirujuk sebelum ini.

[256] Kedua, Ahli Lembaga Pengarah juga bertanggungjawab secara statutori dan fidusiari untuk membuat keputusan secara jujur bagi menafaat dan kepentingan syarikat. Ini termaktub di dalam s 132 Akta Syarikat 1965 yang terpakai dalam kes ini. Seksyen 132(1) memperuntukkan bahawa 'A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company'. Seksyen 132(3) pula menyatakan sebarang pelanggaran peruntukan seksyen itu oleh mana-mana pengarah adalah suatu kesalahan di bawah Akta tersebut.

[257] Ketiga, sebenarnya SP15 sendiri tidak memberitahu mahkamah bahawa Lembaga Pengarah FICSB membuat keputusan meluluskan pembelian MPHS dan penubuhan anak syarikat baru kerana diarah atau dipengaruhi oleh tertuduh. SP15 hanya menyatakan selepas pembentangan oleh SP15, tertuduh memaklumkan kepada mesyuarat bahawa FICSB perlu ambil kira elemen lain seperti 'goodwill' untuk timbang harga RM160 juta yang ditawarkan oleh GAPSB, yang dicadangkan oleh tertuduh untuk diterima. Lembaga Pengarah bersetuju dengan harga ini.

[258] Memang kertas cadangan (P69) itu pun yang disediakan pihak pengurusan yang diketuai SP15 mencadangkan pembelian MPHS (pada harga RM153 juta). *SP15 sendiri memberi keterangan dalam penyataan bertulis beliau bahawa dalam pembentangan kertas cadangan di mesyuarat Lembaga Pengarah FICSB tersebut, pihak pengurusan telah membuat semakan semula dan atas asas potensi pelancongan di sekitar lokasi MPHS, 'sekiranya pengambilalihan ini berlaku, MPHS akan memperolehi keuntungan'.*

[259] Keempat, langsung tiada keterangan daripada Ahli Lembaga Pengarah FICSB yang mana-mana daripada mereka diarah atau dipengaruhi untuk meluluskan pembelian atau penubuhan anak syarikat. Sebenarnya tiada seorang pengarah FICSB lain pun yang dipanggil oleh pendakwaan selain daripada SP15 sendiri yang juga merupakan CEO syarikat untuk mengetahui perkara sebenar yang berlaku semasa mesyuarat yang meluluskan pembelian MPHS pada harga RM160 juta tersebut, dan sekiranya mereka diarah tertuduh untuk bersetuju meluluskan pembelian MPHS dengan harga RM160 juta. Tiga lagi pengarah FICSB yang hadir di mesyuarat itu, iaitu Datuk Dr Omar bin Salim, Datuk Ehsanuddin dan Datuk Faizoull bin Ahmad langsung tidak dipanggil pihak pendakwaan. Ini sudah tentunya kurang membantu kes pendakwaan kerana SP15 juga berkata beliau telah memaklumkan ketiga pengarah ini mengenai cadangan meminta diskaun sebanyak RM10 juta daripada GAPSB yang dikatakan telah awalnya dipersetujui oleh tertuduh.

[260] Kelimanya, berkenaan isu pengaruh atau arahan oleh tertuduh ke atas Lembaga Pengarah ini, terdapat satu keterangan yang dibangkitkan oleh pendakwaan dalam hujahan mereka ialah yang diberi oleh Ruzeti Emar bt Mohd Rosli (SP14), setiausaha syarikat dari luar (*external*) FICSB yang terlibat dalam proses merekodkan minit mesyuarat tersebut yang mana beliau mengesahkan bahawa selepas pembentangan perkara 5 Minit Mesyuarat Lembaga FICSB Kali Ke-10 oleh CEO (SP15), tertuduh telah meminta semua Ahli Lembaga Pengarah FICSB bersetuju dengan apa yang SP14 katakan mengenai MPHS dalam pernyataan bertulis beliau 'Tan Sri Isa Samad bertanya kepada semua ahli-ahli Lembaga Pengarah yang hadir 'Kita bersetuju ye? Setuju ye' dan semua ALP yang lain tidak menyatakan mereka tidak bersetuju, maka dianggap sebagai persetujuan sebulat suara oleh ALP FICSB'.

[261] Mahkamah dapati ini nampaknya selari dengan keterangan SP15 di mana dalam penyataan bertulis ada menyebut tertuduh di akhir pembentangan kertas oleh SP15 di mesyuarat tersebut telah berkata bahawa FICSB perlu ambil kira elemen goodwill MPHS dan mencadangkan FICSB membeli MPHS dengan harga RM160 juta, yang dipersetujui oleh Lembaga Pengarah. Tetapi *seperti yang diterangkan mahkamah sebelum ini, syor yang dibuat tertuduh sebagai Pengerusi ini*

tidak boleh dikatakan sebagai arahan atau pengaruh kepada Ahli Lembaga Pengarah membuat keputusan meluluskan pembelian MPHS dengan harga RM160 juta. Secara objektifnya kenyataan tersebut adalah bersifat neutral dalam sesuatu perbincangan dan tidak mempamirkan unsur arahan, dan Ahli Lembaga Pengarah FICSB juga tidak dipanggil untuk memberi keterangan sama ada mereka diarah atau dipengaruhi tertuduh untuk meluluskan pembelian MPHS tersebut.

[265] Walau bagaimanapun, perkara pokoknya ialah, *seperti yang telah diterangkan sebelum ini tiada keterangan sokongan yang boleh dipercayai kepada hujahan pihak pendakwaan bahawa tertuduh telah meluluskan atau mengarah dan mempengaruhi keputusan yang meluluskan pembelian MPHS itu.*

Hence, the finding of the learned trial judge is that there is no credible evidence showing that the appellant had approved the FICSB's purchase of MPHS nor directed or influenced FICSB Board's decision to approve the purchase of MPHS. Now, if that was so, then it would not only have rebutted the presumption invoked by the court under s 50(1) of the MACCA, but it would have demolished the prosecution's case altogether. In this regard it would be opportune to recall the learned trial judge's extempore ruling at the close of the prosecution's case where he stated:

... In view of the evidence of the receipt of the cash by the accused I therefore invoked the statutory presumption under s 50 of the MACC for *the defence to rebut and show that the gratification in the form of cash was not received corruptly and that it was not obtained as a reward for the accused's involvement in the approval by the board of FIC of the purchase of the Merdeka Palace Hotel.* (Emphasis added.)

[37] The prosecution's case is that the appellant had instructed SP21 to demand the gratification from SP16, and upon receiving them periodically from SP16, SP21 had passed them on to the appellant. However, it is important to note that SP16 had stated that the appellant had never requested any gratification from him. In fact, the evidence shows that when SP16 met the appellant in his office for the first time to discuss the offer to sell MPHS, the appellant did not ask for any gratification as reward for bringing the proposed offer of sale of MPHS to the board of FICSB. In fact the evidence shows that the appellant had told SP16 that whilst he can bring the offer to the board, it is still up to the board to approve the purchase of MPHS. The following testimony of SP16 is relevant:

S: Kamu jumpa dengan dia Tan Sri Isa jawab begini, apa Tan Sri Isa kata kamu jawab Isa beri respond yang positif dan *akan cuba membantu* kami namun *keputusan bergantung kepada mesyuarat Ahli Lembaga Pengarah* FICSB *tetapi dia tidak menjanjikan apa-apa kepada saya* dan Ibrahim Baki, betul?

J: Betul.

S: *So, even Isa cannot help you. He can only assist you but there is no guarantee because everything up to the Lembaga Pengarah to decide, am I right, he said that very clearly to you and Ibrahim Baki, setuju?*

J: *Ya.*

[38] Additionally, when SP16 met the appellant for the second time soon after the FICSB Board had approved the purchase of MPHS to thank the appellant, there was also no demand or request from the appellant for any gratification from SP16 for any help rendered by the appellant.

[39] Further, there is no credible evidence showing the appellant having instructed SP21 to make any monetary demand from SP16 as gratification for the assistance that the appellant was to render, or having rendered, in obtaining FICSB's approval for the purchase of MPHS. Now, the decision to buy MPHS at the price of RM160m was made in the tenth FICSB Board of Directors meeting on 29 April 2014. However, according to SP21 the demand for gratification by the appellant came sometime after that. If that was so than it cannot be said that the gratification was for the assistance rendered to obtain the approval of FICSB, as that event had passed and the appellant's assistance would not be required for that purpose. In this regard, the learned trial judge made the following findings:

> [454] *Permintaan untuk mendapatkan suapan dibuat oleh tertuduh melalui SP21 kepada SP16 berlaku selepas FICSB membuat keputusan membeli MPHS pada harga RM160 juta dalam mesyuarat Lembaga Pengarah FICSB Kali Ke-10 pada 29 April 2014.* Secara spesifik juga boleh dirumuskan permintaan tersebut berlaku selepas SP16 dan Ibrahim bin Baki bertemu dengan tertuduh pada kali kedua di pejabat Pengerusi FELDA bagi menzahirkan ucapan terima kasih GAPSB kepada tertuduh atas keputusan FICSB membeli MPHS pada harga RM160 juta. Menurut keterangan SP21 perkara permintaan suapan ini ditimbulkan oleh tertuduh ketika beliau menceritakan kepada SP21 mengenai pembelian MPHS oleh FICSB dan hasrat SP16 untuk membantu parti politik PBB di Sarawak.
>
> [455] Walaupun tidak disuarakan dengan spesifik oleh tertuduh, permintaan suapan ini adalah dizahirkan secara tidak langsung kerana dalam konteks perbualan (mengambil kira perkembangan dalam cadangan pembelian MPHS tersebut yang baru diluluskan Lembaga Pengarah FICSB) antara tertuduh dan SP21 mengenai subjek MPHS dan SP16, SP21 memberi keterangan yang tertuduh berkata lebih kurang 'Kalau dia orang bagi apa-apa nanti kau ambil lah'. Pada pemahaman SP21 ungkapan tersebut bermaksud apa-apa jua yang diberikan oleh SP16 atau Ibrahim Baki kepada SP21, maka SP21 perlu menerimanya bagi pihak tertuduh.

[40] We agree with learned counsel for the appellant that if SP16 had made the payments to SP21 based on his perceived apprehension and fear that the appellant would use his influence as Chairman of FICSB to scuttle the transaction if the gratification was not paid, meaning that it was paid as an inducement for the appellant not interfering with the completion of the sale transaction, then there is no prima facie case established against the appellant, as this is not the basis of the charges. What is stated in the charges is that the gratification was paid as a reward for the appellant helping to approve the sale of MPHS to FICSB, and this has not been proved by the prosecution in respect of any of the nine charges. And in fact, the assertion by the prosecution of the

appellant having assisted in the approval of the sale of MPHS is negated by the learned trial judge's findings in respect of the CBT charge that was dismissed at the close of the prosecution's case. That approval, as found by the learned trial judge, was a collective decision of the Board and not that of the appellant alone, nor is there any evidence to show that the appellant had directed or influenced that decision.

[41] The question then is simply this: Whether the alleged offences were proved to have been committed by the appellant as per the charges? The answer is clearly in the negative.

[42] The prosecution has presented two different narratives of their case, where in the charges and their opening statement it was stated that the gratification was a reward for the appellant helping to approve the purchase of MPHS, and then in the course of trial the narrative was changed to one of 'inducement' so that the appellant did not interfere with the completion of the contract for the sale of MPHS. The question then arises as to which element in s 16(a)(A) of the MACCA was used by the learned trial judge in deciding whether a prima facie case has been established against the appellant. Is it one of reward, or one of inducement?

[43] The prosecution cannot change the narrative of their case midstream. They must keep to the particulars stated in the charges as they stand. The prosecution had, however, shifted its position in relation to the charge, and this was in respect of an important aspect of its case, that is the purpose of the gratification. This had quite clearly occasioned prejudice to the appellant. The charges were amended once, however the reason for the gratification stated in the original charges remained the same in the amended charges, which was that the gratification was alleged to have been paid as a reward for the appellant in assisting to get the approval of FICSB for the purchase of MPHS, and not the perceived apprehension of SP16 that the appellant would throw a spanner in the works and scuttle the deal if the gratification was not paid.

[44] It is trite law that the appellant must have sufficient notice of the matter with which he is charged, as otherwise he will be seriously prejudiced in his defence. The statutory embodiment of that principle is found in s 153(1) of the Criminal Procedure Code that reads as follows:

> The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed *as are reasonably sufficient to give the accused notice of the matter with which he is charged.*

[45] In as early as 1937, in the case of *Public Prosecutor v Lee Pak* [1937] 1 MLJ 265, Whitley AG CJ had said:

> I have had to deal with a number of criminal appeals lately, and I have observed that in several cases the charges have been carelessly drawn. Prosecuting officers should devote great care to this part of the preparation of their cases, studying and following the provisions of Chapter XVIII of the Criminal Procedure Code. It is seldom sufficient to copy the section under which the charge is being laid slavishly word for word. *The wording must be adapted to the facts of the particular case. The charge should show the accused exactly and with particularity the case which he has to meet, and should not leave him guessing as to which of a variety of alternatives he is alleged to have offended against.* (Emphasis added.)

[46] And in *Teng Kum Seng v Public Prosecutor* [1960] 1 MLJ 225, Thomson CJ held that:

> The real test in all these cases is whether the accused person gets sufficient certain notice of what is charged against him.

This fundamental principle of procedural law was reiterated by Hashim Yeop A bin Sani J (as he then was) in *Public Prosecutor v Yap Kok Meng* [1974] 1 MLJ 108b:

> It is a fundamental rule that an allegation must be stated with sufficient precision to enable the accused to meet the allegation.

(See also *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509 (FC).)

[47] We find that if the prosecution's case is that the gratification was paid by SP16 by reason of his apprehension that the appellant would scuttle the deal if gratification was not paid, then the charges do not give sufficient notice with precision as to enable the appellant to meet that allegation. We find that the particulars of the purpose of gratification stated in the charges is at variance with the evidence that was adduced at trial. If indeed the gratification was paid as inducement for the appellant not to interfere with the completion of the sale transaction, the charges ought to have been framed as such. However, the purpose of gratification stipulated in the charges is not in tandem with the prosecution's narrative that unfolded at trial, nor is it consistent with their opening statement. Whether the gratification is a reward, as stated in the charges, or an inducement as was submitted at trial, has legal implication as there is an important distinction in so far as an offence under s 16(a) of the MACCA is concerned. Section 16 of the MACCA reads:

> 16 Offence of accepting gratification
>
> Any person who by himself, or by or in conjunction with any other person —
>
> (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or
>
> (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,
>
> any gratification *as an inducement to or a reward for*, or otherwise on account of —

(A) any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or

(B) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned,

commits an offence.

[48] If the gratification is alleged to have been given in return for the appellant not interfering with the smooth completion of the sale transaction, then it would have to be categorised as an inducement for the appellant's forbearance, and not as a reward for the appellant assisting to obtain the approval of the FICSB Board. There is a clear difference between the two, and accordingly, the charges would have to be framed to properly reflect the prosecution's case and afford the appellant the opportunity to present his defence. Thus, the framing of the nine charges are clearly not in accord with the evidence and is at variance with the case for the prosecution. This alone is sufficient to acquit and discharge the appellant at the close of the prosecution as no prima facie case as per the charges have been established.

[49] Thus, we find that the learned trial judge had misdirected himself when ruling that a prima facie case has been established based on the evidence of SP16 that the apprehension and fear of the appellant's influence as Felda Chairman in the completion of the contract was the reason why he gave the gratification as satisfying the element of the charges under s 16(a)(A) of the MACCA, when the charges themselves stipulate that the gratification was paid as reward for his assistance in obtaining the approval of FICSB for the purchase of MPHS.

[50] Further, the learned trial judge had invoked the presumption in s 50(1) of the MACCA when calling for the defence at the close of the prosecution case. Section 50(1) reads:

50 Presumption in certain offences

(1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, *the gratification shall be presumed to have been corruptly received* or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered *as an inducement or a reward for or on account of the matters set out in the particulars of the offence*, unless the contrary is proved.

[51] The effect of this presumption in s 50(1) was well explained by the Court of Appeal in *Noordin Sadakathullah & Ors v Public Prosecutor* [2018]

MLJU 1721; [2019] 1 CLJ 748 as follows:

> [22] ... As a convenient starting point, it ought to be emphasised that by virtue of s 50 of Act 694, in a proceeding against a person for an offence under sub-s 17(a) thereof, *where it is proved that a gratification has been obtained, the gratification shall be presumed to have been corruptly obtained as an inducement for or on account of the matters set out in the particulars of the offence*, unless the contrary is proved. It is necessary to mention that s 50 of Act 694 has been reproduced above in a redacted fashion so as to show only the provisions relevant to the appeal herein.
>
> [23] The learned trial judge correctly stated the law for an offence under sub-s 17(a) of Act 694 to be proved, two elements need to be established before the presumption under s 50 thereof could be invoked. These are:
>
> (a) the appellants were the agents of the Government of Malaysia; and
>
> (b) the appellants obtained the gratification for themselves from PS7 and PW11.
>
> [24] Once these two elements have been proved, the third element of the offence viz, the gratification was corruptly obtained as an inducement for or on account of the matters set out in the charge shall be assumed unless the contrary is proved. The first two elements have been proved by the prosecution. In fact, the learned trial judge found that this evidence was not disputed. The burden to rebut the presumption of this existence of the third element thus shifts to the appellants. They have to prove the third element does not exist. The words 'unless the contrary is proved' appearing in s 50 of Act 694 requires the appellants to show on the balance of probabilities that the fact as alleged in the charge does not exist. This is the trite and settled principle of law laid down by the Privy Council in the seminal case of *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116.

[52] Basically, s 50(1) provides that if the elements or essence of the receipt of gratification, in this case money, by the appellant from SP16 have been proven, the law presumes, unless proven otherwise by rebutting the presumption, that the receipt was made corruptly as inducement or reward for or on account of the matters set out in the particulars of the offence, which in this case is that the reward was paid for the appellant's actions in helping to approve the purchase of MPHS. In this regard, the following paragraphs in the learned trial judge's grounds of judgment are instructive:

> *Elemen kedua dan ketiga — Pemakaian anggapan statutori di bawah s 50(1) ASPRM*
>
> [677] Telah disebut sebelum ini bahawa elemen-elemen atau intipati lain kesalahan di bawah s 16(a)(A) yang *mesti juga dibuktikan pihak pendakwaan adalah sama ada penerimaan wang suapan oleh tertuduh dalam sembilan pertuduhan tersebut adalah dilakukan secara rasuah sebagai upah kepada tertuduh atas penglibatan tertuduh meluluskan pembelian MPHS*.
>
> [678] Walau bagaimanapun, di peringkat akhir kes pendakwaan ini, undang-undang memperuntukkan bahawa pihak pendakwaan tidak perlu membuktikan bahawa penerimaan wang oleh tertuduh dalam sembilan pertuduhan di bawah s 16 ASPRM adalah dibuat secara rasuah dan ianya diterima

atas dasar bantuan penglibatan beliau dalam memberi kelulusan kepada pembelian MPHS daripada GAPSB kerana pendakwaan telahpun berjaya membuktikan elemen atau intipati lain iaitu penerimaan wang suapan oleh tertuduh daripada pemberinya SP16, melalui SP21, seperti dalam sembilan pertuduhan tersebut.

[679] Peruntukan undang-undang tersebut adalah s 50(1) ASPRM yang mengariskan seperti berikut:

50 Anggapan dalam kesalahan tertentu

(1) Jika dalam mana-mana prosiding terhadap mana-mana orang atas *sesuatu kesalahan di bawah seksyen 16*, 17, 18, 20, 21, 22 atau 23 adalah *dibuktikan bahawa apa-apa suapan telah diterima* atau dipersetujui untuk diterima, disetuju terima atau dipersetujui untuk disetuju terima, diperoleh atau cuba diperoleh, diminta, diberikan atau dipersetujui untuk diberikan, dijanjikan, atau ditawarkan oleh atau kepada tertuduh, *suapan itu hendaklah dianggap telah diterima* atau dipersetujui untuk diterima, disetuju terima atau dipersetujui untuk disetuju terima, diperoleh atau cuba diperoleh, diminta, diberikan atau dipersetujui untuk diberikan, dijanjikan atau ditawarkan *secara rasuah sebagai* suatu dorongan *atau upah bagi atau kerana perkara-perkara yang dinyatakan dalam butir kesalahan itu, melainkan jika akasnya dibuktikan*. (Penekanan ditambah.)

[680] Secara asasnya, s 50(1) memperuntukkan bahawa sekiranya elemen atau intipati penerimaan wang oleh tertuduh daripada SP16 telah dapat dibuktikan, undang-undang menganggap, melainkan dibuktikan sebaliknya dengan cara mematahkan anggapan tersebut, penerimaan tersebut dilakukan secara rasuah sebagai upah dan juga upah itu diterima atas tindakan tertuduh membantu meluluskan pembelian MPHS.

[681] Oleh kerana, seperti yang mahkamah dapati sebelum ini, pihak pendakwaan telah pada peringkat akhir kes pendakwaan berjaya membuktikan penerimaan wang suapan oleh tertuduh dalam sembilan transaksi berjumlah RM3.09 juta daripada SP16 (melalui perantara SP21), undang-undang dalam s 50(1) ASPRM telah diaktifkan dengan penggunaan anggapan tersebut, di mana elemen atau intipati penerimaan tersebut telah dianggap dibuat secara rasuah dan penerimaan upah itu disebabkan oleh bantuan kelulusan MPHS oleh tertuduh.

[682] Nas undang-undang pemakaian anggapan undang-undang di bawah s 50(1) ASPRM ini sudah mantap. Ianya juga tidak kurang melibatkan kes-kes rasuah yang berasaskan anggapan yang sama tetapi yang termaktub di bawah undang-undang statut rasuah yang telah pun mansuh, seperti s 14 Akta Pencegah Rasuah 1961 dan s 42 Akta Pencegahan Rasuah 1997.

[53] The learned trial judge had proceeded to apply the presumption in s 50(1) and found that the third element of the offence under s 16(a)(A) of the MACCA, which is that, the receipt of gratification was made corruptly as a reward for the appellant's actions in helping to obtain FICSB Board's approval for the purchase of MPHS. Now, as discussed earlier, this presumption is negated by the evidence of SP16 himself who had testified that the appellant never told or gave any assurance to SP16 that he would assist in

procuring the Board approval, and that instead he had paid the monies to SP21 not as a reward for the appellant's assistance in procuring the approval of FICSB Board for the sale as stated in the charges, but instead to allay and put to rest his own fear and apprehension that if the monies were not paid the appellant would subsequently derail the transaction by using his position as FELDA/FICSB Chairman.

[54] The application of s 50(1) and the arising presumption that the gratification was paid as reward for the assistance rendered by the appellant in obtaining FICSB's approval is in itself contrary to the learned trial judge's finding that the gratification was corruptly given by SP16 because he was afraid that if payment is not made then the appellant could jeopardise the contract for sale of MPHS and payment of the sale proceeds could be delayed or the approval to purchase MPHS could be cancelled due to the influence of the appellant as Chairman of FICSB. This contrary finding can clearly be seen in paras 461, 556 and 958 of the grounds of judgment.

> [461] Menurut SP16, pihak beliau dengan Ibrahim Baki tidak ada pilihan dan akur dengan permintaan tertuduh yang dibuat sebelum ini. Mereka khuatir dengan pengaruh tertuduh sekiranya mereka tidak bersetuju dengan permintaan ini, umpamanya ada kemungkinan tertuduh boleh bertindak untuk mengakibatkan pembayaran kepada GAPSB dilengahkan atau kelulusan urusniaga pembelian MPHS dibatalkan terus kerana sebelum ini FICSB telahpun menolak cadangan pembelian MPHS.
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> [556] Dengan lain perkataan, wang suapan dalam kes ini, sepertimana yang diperincikan dalam kesemua sembilan pertuduhan adalah sebagai upah atas penglibatan tertuduh dalam kelulusan pembelian MPHS tersebut. Lebih-lebih lagi, SP16 telah memberi keterangan bahawa setelah permintaan dibuat beliau telah bersetuju untuk memberi tiga juta kerana bimbang pembelian MPHS tersebut tidak terlaksana walaupun telah diluluskan atas sebab pengaruh tertuduh sebagai Pengerusi FELDA dan FICSB. Ini juga boleh dianggap sebagai upah untuk memastikan FICSB meneruskan pelaksanaan pembelian MPHS setelah memberi kelulusan terhadapnya.
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> [958] Tiada sebab lain mengapa suapan diberikan kepada beliau. Ianya telah jelas diterangkan oleh pemberi sendiri, SP16 iaitu kerana diminta tertuduh. Ini adalah selepas tertuduh bersama Ahli Lembaga Pengarah FICSB yang lain meluluskan pembelian MPHS dan disebabkan SP16 dan Ibrahim Baki tidak mahu kelulusan pembelian tersebut diganggu ataupun perlaksanaan pembelian dibatalkan atas dasar pengaruh tertuduh sebagai Pengerusi dan Pengarah FICSB sekiranya suapan upah tidak diberikan kepada tertuduh.

[55] The payment of gratification based on the apprehension of SP16 that the appellant could scuttle the deal subsequent to the approval cannot be equated with payment as reward for the appellant in assisting GAPSB to obtain FICSB's Board approval for the sale transaction. They are two entirely different matters. There is absolutely no evidence that the appellant had said that he

would scuttle the deal if payment is not made nor is there any basis for such inference to be made. The FICSB Board approval had been obtained well before this alleged fear or apprehension came into the mind of SP16. Hence, we find that the learned trial judge had erred in finding that the third element of the offence had been proved by invoking the presumption in s 50(1), and holding that the gratification was paid and the receipt was made by the appellant corruptly as a reward and that the reward was for the appellant's actions in helping to obtain FICSB's approval for the purchase of MPHS. This also goes against the High Court's earlier finding in respect of the first charge for CBT, where the learned judge found that the approval for the purchase of MPHS was a collective decision of the FICSB Board and not that of the appellant, and that the appellant had not directed or influenced that decision. In this regard, we agree with learned counsel for the appellant that the learned trial judge had erred when making different and inconsistent findings as to the purpose of gratification.

The second issue: Payment of gratification to the appellant

[56] The learned trial judge found that there was no direct demand for gratification from the appellant and that the demand was made indirectly when in the course of conversation between the appellant and SP21, the appellant is alleged to have told SP21, 'Kalau dia orang bagi apa-apa nanti kau ambil lah', by which SP21 understood it to mean that if SP16 or Ibrahim Baki gave him anything then he ought to accept it on the appellant's behalf.

[57] Now, the words 'Kalau dia orang bagi apa-apa nanti kau ambil lah', even if said by the appellant, cannot be construed as an instruction or direction by the appellant to SP21 to demand gratification from SP16 or Ibrahim Baki. Nor could it be construed to mean that the appellant was asking SP21 take any money offered by SP16 as gratification for and on behalf of the appellant. The literal translation of that statement is 'Henceforth if they give you anything you take it'. There is nothing in that statement that can be construed as a demand for gratification as reward for the assistance rendered by the appellant in obtaining the FICSB Board's approval for the purchase of MPHS.

[58] SP21 further said that from time to time the appellant would ask him to convey his 'salam' to SP16 following which he would contact SP16 and payment would be made by SP16, which he then gave to the appellant. Apparently the 'salam' greeting was the trigger for SP21 to ask for payment from SP16. However, there is no credible evidence showing that there was such an understanding or arrangement between the appellant and SP21 to use such a code, ie the conveying of 'salam' as the trigger to request for payment from SP16. In fact, the conveying of 'salam' through an intermediary is customary practice amongst Muslims in this country. 'Bila jumpa dia tolong kirim salam

saya' is an everyday adat of the Malay-Muslim community. This is similar to the conveying of one's best regards or wishes to another through a third party intermediary. In the absence of any evidence connoting that the appellant asking SP21 to convey his 'salam' to SP16 had a special meaning or nuanced undertone which was the signal for SP21 to make the periodic demand for gratification from SP16, the court cannot give credence to SP21's evidence in this regard. Let alone it being construed as the appellant making a demand for gratification.

[59] Further, it must be noted that SP21's testimony on this 'salam' trigger was not consistent. It can be seen from the cross-examination of SP21 that he had given contradictory evidence in that regard, where:

(a) SP21 at first stated that the appellant gave the salam greeting to be conveyed to SP16 before each and every transaction;

(b) SP21 then changed his testimony and stated that the appellant did not give the salam greeting as a signal before each and every transaction;

(c) SP21 then stated that though the conveying of the salam greeting was a pattern before each transaction, this was not included in his witness statement; and

(d) SP21 admitted that he only used the salam greeting that had been given earlier in the past and that the appellant never asked to convey his salam to SP16 before each transaction.

[60] There were attempts by the prosecution during re-examination of SP21 to seek clarification and remove the ambiguity arising from his contradictory testimony. However, these attempts did effectively explain away the discrepancies. This would, thus, have the effect of diminishing the probative value of SP21's evidence and render the reliance on such evidence unsafe, as was noted by this court in *Nasrul Annuar bin Abd Samad v Public Prosecutor* [2005] 1 MLJ 619; [2005] 1 CLJ 193:

> ... The uncertainties in the answers given by her were not subjected to a proper re-examination. The object of this examination is to give an opportunity to a witness to explain any part of his evidence given in cross-examination which is capable of being construed unfavourably (see *Law of Evidence* by Woodroffe & Amir Ali (16th Ed) Vol 4 p 3623). In view of the vague evidence of PW3 as shown in her cross-examination which has not been effectively explained in her re-examination it is unsafe to rely on her evidence. Furthermore her credibility must be judged against the fact that she admitted in cross-examination ...

[61] Further, we noted that these uncertainties in SP21's testimony and material contradictions in the answers given by SP21 on this crucial issue of the conveying of the salam greeting from the appellant as the trigger signal for

SP21 to make demands for payment from SP16 were not properly evaluated by the learned trial judge in the grounds of judgment. The learned trial judge should have objectively evaluated SP21's answers during cross-examination on this very important issue because such an exercise will greatly assist the court to examine the credibility, consistency and accuracy of SP21's testimony. The trial judge was bound to consider the entire evidence objectively. This is particularly so when SP16 said that the total amount agreed to be paid by SP16 as gratification was RM3m, but when the amounts stated in the nine charges are tallied they total more than RM3m, ie RM3.09m, and no plausible explanation was given by SP21 for this contradiction. What is the purpose of this excess payment? The lack of credible explanation affects the credibility of SP21, and poses the question as to whether SP21 took money from SP16 for himself. And when such doubt is created, it must be resolved in favour of the appellant.

[62] The learned trial judge was duty bound to judicially and adequately consider these facts, as was reiterated by this court in *Koo Wing Cheung (L) & Anor v Public Prosecutor* [2014] 1 MLJ 229; [2014] 1 CLJ 46, where in relation to the failure of the trial judge to consider all available evidence objectively, the court had this to say:

> All these were never judicially and adequately considered by the learned trial judge in his judgment. The learned trial judge had failed to view the evidence of the defence objectively and from all angles. Now, by virtue of s 182A of the CPC at the conclusion of the trial, the learned trial judge must consider all the evidence adduced before him and shall decide whether the prosecution had proved its case beyond reasonable doubt. As a result, the learned trial judge had failed to give the evidence adduced by the defence its due weight and importance and which if duly considered was capable of raising more than a reasonable doubt in the case of the prosecution against both the appellants (see: *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183; [1992] 3 CLJ 1535; [1992] 1 CLJ Rep 376). The learned trial judge failed to critically and judicially appreciate the entire evidence in favour of the appellants. In our judgment, the failure to take into consideration the entire evidence adduced by the defence and the failure to undertake judicial appreciation of the defence, as we have highlighted above, amounted in effect to a failure to consider a defence which had been put forward. In our view, this is a serious non-direction which amounts to a misdirection by the court below warranting appellate intervention (see: *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238; [1965] CLJU 37; [1965] 1 LNS 37). In this regard, Edgar Joseph Jr SCJ in *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1 said:
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> > Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for, in the words of Pickford J in *R v Bundy* 5 Cr App R 270:
> >
> > > the trial was not satisfactory, and the case was not put to the jury in a way

to ensure their due appreciation of the value of the evidence.

> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

[63] Hence, with due respect, the failure of the trial judge to undertake a wholesome and proper judicial appreciation of the evidence of SP21 in its entirety is a serious non-direction that amounts to a misdirection that warrants appellate intervention. The learned trial judge erred in failing to examine the entire evidence of SP21 before deciding that the appellant had signalled to SP21 to convey the appellant's salam greetings to SP16 in all nine of the charges, whereas SP21's evidence during cross-examination clearly showed that this was not the case. And as a matter of fact, the failure to make this objective assessment of the evidence had resulted in the learned trial judge making an erroneous finding of fact that the appellant had asked SP21 to convey his salam to SP16 on each and every of the nine occasions stipulated in the charges before the gratification was demanded from SP16. This erroneous finding is found in paras 476 and 477 of the grounds of judgment:

> *Persamaan dengan lapan pertuduhan penerimaan suapan yang lain*
>
> [476] Mahkamah mendapati keterangan yang dikemukakan pihak pendakwaan mengenai lapan pertuduhan menerima suapan yang lain, iaitu pertuduhan pindaan ketiga hingga pertuduhan pindaan kesepuluh menunjukkan perlakuan permintaan suapan oleh tertuduh dan yang lebih penting lagi kepada intipati pertuduhan, penerimaan wang-wang suapan oleh tertuduh dalam dalam pertuduhan-pertuduhan tersebut adalah hampir serupa dan tiada perbezaan material dengan *modus operandi* yang dianalisa sebelum ini mengenai pertuduhan pertama (pindaan kedua).
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> [477] Kecuali perkara yang berkaitan dengan tarikh kejadian dan jumlah wang yang terlibat. *Dalam setiap sembilan situasi, tertuduh memberi isyarat kepada SP21 untuk menyampai salam tertuduh kepada SP16.* SP16 kemudiannya membuat usaha untuk mendapatkan wang tunai untuk seterusnya diserahkan oleh SP16 sendiri kepada SP21 bagi tujuan pemberian oleh SP21 kepada tertuduh. Dalam setiap situasi juga SP21 menyerahkan wang tersebut kepada tertuduh ketika SP21 berjumpa tertuduh di pejabat Pengerusi FELDA beberapa hari selepas penerimaan oleh SP21.

[64] Though in his evidence in chief, SP21 stated that the appellant had before every demand for gratification asked SP21 to convey his salam to SP16, which SP21 assumed was the code for the demand for gratification to be made to SP16, he had during cross-examination SP21 resiled from that and agreed with counsel for the appellant that the appellant did not ask him to convey salam to SP16 in all circumstances of the nine charges and that the appellant did not give such greeting before each time the gratification was demanded from SP16. Hence, the learned trial judge's finding of fact in para 477 goes against the grain of evidence. And this was, with respect, occasioned by the

failure of the learned trial judge to properly consider the evidence of SP21 in its totality, particularly his inconsistent evidence during cross-examination.

[65] We also find that the learned trial judge's finding that there was demand for gratification made by the appellant through SP21 as conduit and that SP16 had made nine payments via SP21 to the appellant is not borne out by credible evidence. This finding of the learned trial judge is found in paras 474 and 475 of the grounds of judgment:

> [474] Dalam dapatan mahkamah, keterangan juga berjaya membuktikan perbuatan tertuduh sendiri yang membuat permintaan wang suapan tersebut daripada SP16 seperti yang diucapkan tertuduh kepada SP21. Keterangan ini adalah relevan kepada pertuduhan di bawah s 8 Akta Keterangan 1950 seperti yang dinyatakan sebelum ini.
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> [475] Konteks permintaan adalah penting. Perlu diulangi bahawa tertuduh pertamanya selepas kelulusan pembelian MPHS oleh Lembaga Pengarah FICSB dan lawatan terima kasih oleh SP16 dan Ibrahim Baki memberitahu SP21 untuk terima apa-apa yang mungkin diberi oleh SP16; keduanya selepas menandatangani arahan pembayaran RM16 juta kepada GAPSB, tertuduh memberitahu SP21 untuk menyampaikan salam tertuduh kepada SP16 apabila mendapat tahu SP16 tidak menghubungi SP21; ketiganya, mengarahkan SP21 bertanya kepada SP16 sekiranya sejumlah wang pendahuluan dapat diserahkan kepada tertuduh terlebih dahulu (walaupun menurut SP16 GAPSB belum terima RM16 juta itu); dan keempatnya setelah pertanyaan tersebut dibuat oleh SP21, membenarkan SP21 untuk berjumpa SP16 di PJ Hilton atas jemputan SP16.

The evidence shows that SP16 made nine payments to SP 21. However, apart from the oral evidence of SP21, there is no other evidence showing that the appellant had received any of these payments from SP21. There is also no credible evidence of the appellant having made any demand to SP16 or Ibrahim Baki for gratification in the sum of RM3m as reward for him rendering assistance to obtain FICSB's approval for the transaction.

[66] In respect of the High Court's finding that the appellant made various demand for gratification by using the request to convey the 'salam' as the signal or trigger for SP21 to make the demand for payment from SP16, we find that there is no evidential basis for the trial judge to have made that inference. The prosecution has not presented any evidence that there were instances before this case where the appellant had used the 'salam' or conveying of the 'salam' as a code to request for money from anyone. SP21 himself has not provided any evidence that the appellant had previously used the 'salam' or the conveying of 'salam' as having a special coded meaning or that the appellant had used such a signal before.

[67] Further, the High Court's finding that the request by the appellant to SP21 to convey his 'salam' to SP16 carried a hidden or coded meaning to

demand gratification from SP16 based solely on SP21's understanding that it carried such a meaning, without ascribing any reason for the basis of such a belief. The mere fact that SP21 was the appellant's special officer at that material time in itself is insufficient, in our view, for the court to form that opinion. Therefore, in the absence of this crucial evidence, the learned trial judge cannot subjectively make such an inference without proper factual basis. Every inference drawn by the court must be supported by factual evidence and not just based on speculation or conjecture. Neither should it be based on the mere belief or assumption of a witness. The court cannot decide a matter based solely on the understanding or conjecture of a witness, there must be credible evidence to establish the case as required under s 182 of the Criminal Procedure Code.

[68] Inference must be based on evidence, direct or circumstantial, and nothing else. This principle was reiterated by the Indian Supreme Court in *Maharashtra State Board of S & HS Education v KS Gandhi* [1991] 2 SCC 716, as follows:

> ... inference from the evidence and circumstances must be carefully distinguished from conjecture or speculation. The mind is prone to take pleasure to adopt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence, direct or circumstantial, to deduce necessary inference in proof of the facts in issue. There can be no inference unless there are objective facts directs or circumstantial from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred as much as practical as if they had been actually observed. In other cases the inferences do not go beyond reasonable probability. If there are no positive true facts, oral, documentary or circumstantial from which the inference can be made, the inference fails and what is left is mere speculation or conjecture.

The court cannot act on conjecture or speculation. Even where inference can be made, the inference must be based on evidence.

CONCLUSION

[69] Thus we find that in the overall there are merits in the appeal, and appellate intervention is warranted. For the reasons stated above, we find the convictions on all nine charges under s 16(a)(A) of the MACCA are not safe. Hence, the appeal against conviction and sentence in respect of all charges is allowed and the order of the High Court is set aside. The appellant is acquitted and discharged.

Appeal allowed; conviction and sentence set aside; and appellant acquitted and discharged.

Reported by Ashok Kumar